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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 583

LONAS RAY CAUGHORN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Lonas Ray Caughorn prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on October 17, 1960.

OPINION BELOW.

The District Court did not render a written opinion. The judgment of the Court of Appeals for the Sixth Circuit is annexed hereto as an Appendix, on page A1.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 17, 1960. Extensions of time within which to file this petition for writ of certiorari were granted by orders of Mr. Justice Potter Stewart to and including December 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1).

QUESTIONS PRESENTED.

(1) Did the District Court err in failing to grant petitioner's motion to dismiss the indictment?

(2) Did the District Court err in refusing to grant petitioner's motion for a verdict of acquittal?

(3) Did the District Court err in charging the jury as follows:

> "* * * I say, this contract purports to be between the Department of Justice and the Knox County jail officials, whereby, briefly stated, Knox County authorities agree for federal prisoners to be handled in the Knox County jail at so much per diem, and in that connection the Court charges you that a person is committed to the Knox County jail under a lawful order of a federal district having authority to issue such an order to the Knox County jail, then the person

who is committed is in the custody of the Federal Government and is in the custody of the Attorney General of the United States.

"Finally, he is being held by the present sheriff, E. B. Bowles, and his deputies, charged with a federal offense, being held on the charge of a federal offense, and is in custody of the United States Government."

(4) Did the District Court err in charging the jury, over the objection of petitioner's counsel, as follows:

"The Court: Ladies and gentlemen, the warrant which refers to the alleged Dyer Act charge is not pertinent for any purpose in this case except for whatever bearing it may have, if any, on the question of whether or not this defendant was in federal custody at the time he allegedly escaped from federal custody. You will only consider that paper as bearing on that question and no other; in other words, don't allow that paper to prejudice his rights, the rights of this defendant as to whether or not he is guilty or not guilty of the charge contained in this indictment. You may look to it as bearing on the question of whether he was in federal custody at the time he allegedly escaped from the Knox County jail."

(5) Did the District Court err in charging the jury, over the objection of petitioner's counsel, as follows:

"The Court: The Court charges the jury that if the Attorney General of the United States designates the marshal to take charge of a prisoner and at the same time directs him to put the prisoner in the Knox County jail, under a contract, then the Knox County jail is a representative of the Attorney General of the United States, and the prisoner is in custody in jail."

(6) Did the District Court err in refusing the request of petitioner's counsel to charge the jury as follows:

"Mr. Badgett: I would like for your Honor to charge that if he was not confined under a lawful order or process, that he would not be in the custody of the Attorney General and could not be guilty of the escape."

(7) Did the District Court err in failing and refusing to charge the jury the request made by petitioner's counsel, as follows:

"Mr. Badgett: I would like your Honor to charge that before he can be guilty under this indictment he would have to have escaped from legal custody."

STATUTES INVOLVED.

Title 18, U.S.C., Section 751. *Prisoners in custody of institution or officer.*

"Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both."

Title 18, U.S.C., Section 1073. *Flight to avoid prosecution or giving testimony.*

"Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, arson punishable as a felony, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing offenses as they are defined either at common law or by the laws of the place from which the fugitive flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by imprisonment in a penitentiary is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement."

RULE INVOLVED.

Federal Rules of Criminal Procedure.

Rule 40. *Commitment to Another District; Removal.*

* * *

(b) ARREST IN DISTANT DISTRICT.

(1) *Appearance before Commissioner or Judge.* If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

(2) *Statement by Commissioner or Judge.* The commissioner or judge shall inform the defendant of

the charge against him, of his right to retain counsel and of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.

(3) *Hearing; Warrant of Removal or Discharge.* The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(4) *Hearing and Removal on Arrest without a Warrant.* If a person is arrested without a warrant, the hearing may be continued for a reasonable time, upon a showing of probable cause to believe that he is guilty of the offense charged; but he may not be removed as herein provided unless a warrant issued in the district in which the offense was committed is presented."

STATEMENT.

Petitioner was indicted November 23, 1959, in the Eastern District of Tennessee, Northern Division, in one count, charging a violation of Title 18, U.S.C., Section 751, in that he did in that jurisdiction allegedly escape from the custody of the Attorney General of the United States and his authorized representatives while he was being held in custody by virtue of an arrest on a charge of violation of Title 18, U.S.C., Section 1073, "a felony".

Petitioner received the maximum sentence, to-wit: five years, and is now incarcerated in Alcatraz.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals for the Sixth Circuit erred in holding:

(1) It was not error for the District Court to refuse to grant petitioner's motion to dismiss the indictment;

(2) It was not error for the District Court to refuse to grant petitioner's motion for a verdict of acquittal;

(3) It was not error for the District Court to charge the jury as follows:

"* * * I say, this contract purports to be between the Department of Justice and the Knox County jail

officials, whereby, briefly stated, Knox County authorities agree for federal prisoners to be handled in the Knox County jail at so much per diem, and in that connection the Court charges you that a person is committed to the Knox County jail under a lawful order of a federal district having authority to issue such an order to the Knox County jail, then the person who is committed is in the custody of the Federal Government and is in the custody of the Attorney General of the United States.

"Finally, he is being held by the present sheriff, E. B. Bowles, and his deputies, charged with a federal offense, being held on the charge of a federal offense, and is in custody of the United States Government."

(4) It was not error for the District Court to charge the jury, over the objection of petitioner's counsel, as follows:

"The Court: Ladies and gentlemen, the warrant which refers to the alleged Dyer Act charge is not pertinent for any purpose in this case except for whatever bearing it may have, if any, on the question of whether or not this defendant was in federal custody at the time he allegedly escaped from federal custody. You will only consider that paper as bearing on that question and no other: in other words, don't allow that paper to prejudice his rights, the rights of this defendant as to whether or not he is guilty or not guilty of the charge contained in this indictment. You may look to it as bearing on the question of whether he was in federal custody at the time he allegedly escaped from the Knox County jail."

(5) It was not error for the District Court to charge the jury, over the objection of petitioner's counsel, as follows:

"The Court: The Court charges the jury that if the Attorney General of the United States designates

the marshal to take charge of a prisoner and at the same time directs him to put the prisoner in the Knox County jail, under a contract, then the Knox County jail is a representative of the Attorney General of the United States, and the prisoner is in custody in jail."

(6) It was not error for the District Court to refuse the request of petitioner's counsel to charge the jury as follows:

"Mr. Badgett: I would like for your Honor to charge that if he was not confined under a lawful order or process, that he would not be in the custody of the Attorney General and could not be guilty of the escape."

(7) It was not error for the District Court to fail and refuse to charge the jury the request made by petitioner's counsel, as follows:

"Mr. Badgett: I would like your Honor to charge that before he can be guilty under this indictment he would have to have escaped from legal custody."

REASONS FOR GRANTING WRIT.

The questions presented here are substantial and are of widespread importance, in that we have found no decisions of any appellate court on the questions. There is one decision, to-wit: *United States* v. *Punchsak*, 146 F. Supp. 523, by the District Court of Alaska which holds directly contrary to the decision of the United States Court of Appeals for the Sixth Circuit in this case.

All of the questions presented evolve into one single issue, which is: *can one who is not in legal custody of the Attorney General of the United States be convicted of escape from the custody of the United States in violation of Title 18, U.S.C., Section 751?*

Motion was made to dismiss the indictment on the ground that the records of the United States District Court for the Eastern District of Tennessee show that at the time petitioner is alleged to have escaped from the custody of the Attorney General of the United States and his authorized representatives, petitioner was not legally in arrest on a charge of violating Title 18, U.S.C., Section 1073, but was being illegally and unlawfully restrained of his liberty and was not in legal custody of the Attorney General of the United States. Motion for a verdict of acquittal was made on the same ground. Both motions were overruled.

The records of the District Court Clerk's office for the Eastern District of Tennessee, and the proof, showed the following:

No warrant was ever issued by a United States Commissioner or a federal judge in the Eastern District of Tennessee for a violation of Title 18, U.S.C., Section 1073. Agents of the Federal Bureau of Investigation arrested petitioner in Knoxville, Tennessee, without a warrant, but on information that a complaint had been issued in Atlanta, Georgia, charging petitioner with unlawful flight (Title 18, U.S.C., Section 1073), to escape imprisonment on the State of Georgia's charge of robbery. No such warrant was ever served upon petitioner. The United States Commissioner at Knoxville, Tennessee, went to the Knox County jail where agents of the F.B.I. had placed petitioner, and petitioner waived a hearing. The United States Commissioner at Knoxville, Tennessee, made no report to the United States District Judge for the Eastern District of Tennessee of the waiver, but instead the Commissioner wrote up a commitment which directed the United States Marshal for the Eastern District of Tennessee "to take custody of the defendant and commit him with a certified copy of the commitment to the custodian of a place of confinement within

the Eastern District of *Georgia* (emphasis ours) approved by the Attorney General of the United States, where the defendant shall be received and safely kept until discharged in due course of law".

Subsequently, petitioner was charged with a violation of the Dyer Act in the Eastern District of Tennessee and given a commissioner's hearing at Knoxville, but no commitment was issued by the Commissioner at Knoxville because, as he testified, he considered petitioner already to be in lawful arrest on the unlawful flight charge.

Petitioner was held on this illegal and unlawful commitment issued by the United States Commissioner for the Eastern District of Tennessee, from the time of his arrest on February 25, 1959, until he left the Knox County jail at Knoxville, Tennessee, on May 6, 1959.

At the time petitioner is alleged to have escaped the Knox County jail, at Knoxville, Tennessee, and committed the alleged violation with which this petition is concerned, he was being illegally and unlawfully restrained of his liberty for the following reasons:

(a) No warrant charging unlawful flight (Title 18, U.S.C., Section 1073) was ever served on petitioner.

(b) Under Rule 40, Federal Rules of Criminal Procedure, the United States Commissioner for the Eastern District of Tennessee had no right to commit petitioner for transfer to a place of confinement in the State of Georgia. Under this rule, only a district judge may issue a removal warrant.

(c) No removal warrant was ever issued by the District Judge of the Eastern District of Tennessee ordering petitioner's removal to Georgia.

(d) Petitioner was not in legal custody on the alleged Dyer Act violation because no commitment was ever issued by the United States Commissioner.

(e) Even if the United States Commissioner's commitment were valid, which, of course, it could not be, petitioner was not committed to the Knox County jail at Knoxville, Tennessee, from where he is charged to have escaped.

(f) The District Judge of the Eastern District of Tennessee could not have issued a removal warrant to Georgia under Rule 40, Federal Rules of Criminal Procedure, because no warrant from a district court in Georgia was ever presented before petitioner is charged with escaping the Knox County jail at Knoxville, Tennessee.

Under the facts of this case, the government must concede that the petitioner was not in the legal custody of the Attorney General when he is alleged to have escaped. Petitioner's position is that to sustain a conviction he must have been in the legal custody of the Attorney General of the United States under the provisions of Title 18, U.S.C. Section 751.

The only case we can find on the question is the case of *United States* v. *Punchsak*, 146 F. Supp. 523, wherein the District Court said:

> "I am of the opinion that the law is fairly well established that physical and legal custody are two different matters as far as a violation of 18 U.S.C. 751 is concerned. Giles v. U. S., (9 C.C.A. 1946) 157 F.2d 588. The appellate court established in this case that one could be in legal custody of the Attorney General when he was not in actual physical custody. It is just as reasonable to hold that one could be in the physical custody of the Attorney General without being in his legal custody."

In that case, the court discharged the defendant by holding that although he was in the physical custody of the Attorney General he was not in his legal custody.

The government will probably cite in the instant case, *Godwin* v. *United States*, (C.C.A. 8, 1950) 185 F.2d 411, and *Bayless* v. *United States*, (C.C.A. 9, 1944) 141 F.2d 578, to sustain its position. These cases hold that one cannot test the propriety of his confinement by forceably escaping. These cases are distinguishable on the facts from the instant case, because in those cases the escapee was in the custody of the Attorney General under legal process, which is not the fact in the instant case. If the government insists here that one cannot test the propriety of his confinement by escaping, that would beg the question. The question is whether having escaped when *not* in legal custody, can the escapee be punished under the provisions of Title 18, U.S.C., Section 751?

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM EARL BADGETT,
608 Bank of Knoxville Building,
Knoxville, Tennessee,
Counsel for Petitioner.

APPENDIX.

Judgment of the United States Court of Appeals for the Sixth Circuit.

(Filed October 17, 1960.)

No. 14,169.

This appeal from a judgment of guilty on the verdict of a jury and commitment to five years' imprisonment for violation of Title 18, Section 751, United States Code, has been duly heard and considered on the oral arguments and briefs of attorneys and on the record in the case;

And there being found that no reversible error was committed by the United States District Judge in the proceedings in the case;

The judgment of conviction and sentence is affirmed. 28 U.S.C.A., Section 2111; Rule 52(a), Federal Rules of Criminal Procedure.

ENTER:

/s/ John D Martin
United States Circuit Judge

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not render a written opinion, nor did the Court of Appeals for the Sixth Circuit. The judgment of the Court of Appeals is printed at page A–1 of the petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 17, 1960 (Pet. App. A–1). Extensions of time within which to file the petition for a writ of certiorari were granted by orders of Mr. Justice Stewart to and

including December 16, 1960. The petition was filed on December 14, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

May a prisoner convicted of escape from lawful federal custody under 18 U.S.C. 751 raise on appeal technical defects in his original commitment as a justification for his escape?

STATUTES AND RULES INVOLVED

Title 18, U.S.C., Section 751:

> *Prisoners in custody of institution or officer.*—Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both.

Title 18, U.S.C., Section 1073:

> *Flight to avoid prosecution or giving testimony.*—Whoever moves or travels in inter-

state or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, arson punishable as a felony, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing offenses as they are defined either at common law or by the laws of the place from which the fugitive flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by imprisonment in a penitentiary is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement.

Federal Rules of Criminal Procedure:

RULE 4. *Warrant or Summons upon Complaint.*—(a) *Issuance.* If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

* * * * *

(c) *Execution or Service; and Return.*

* * * * *

(3) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

* * * * *

RULE 40. *Commitment to Another District; Removal.*

* * * * *

(b) *Arrest in Distant District.*

(1) *Appearance before Commissioner or Judge.* If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

(2) *Statement by Commissioner or Judge.* The commissioner or judge shall inform the defendant of the charge against him, of his

right to retain counsel and of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.

(3) *Hearing; Warrant of Removal or Discharge.* The defendant shall not be called upon to plead. If the defandant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. * * * If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(4) *Hearing and Removal on Arrest without a Warrant.* If a person is arrested without a warrant, the hearing may be continued for a reasonable time, upon a showing of probable

cause to believe that he is guilty of the offense charged; but he may not be removed as herein provided unless a warrant issued in the district in which the offense was committed is presented.

STATEMENT

Petitioner escaped from the Rock Quarry Prison Branch, Buford, Georgia (a State prison) on January 3, 1959. On January 7, 1959, a United States Commissioner in Atlanta, Georgia, issued a warrant for petitioner's arrest, on the charge of violation of 18 U.S.C. 1073, *supra*, pp. 2–3 (R. 2b–4b). On February 25, 1959, petitioner was arrested in Knox County, Tennessee, by agents of the Federal Bureau of Investigation, on a charge of unlawful flight from the State of Georgia to avoid confinement following conviction for burglary, in violation of 18 U.S.C. 1073 (R. 95a–97a). Petitioner was advised of the existence of the warrant and the reason for his arrest. He did not request to see the warrant (R. 96a–97a). Actually, the warrant was not sent to Knoxville until May 7, 1959 (R. 1b).

Within two hours of his arrest on February 25, 1959, between 8:30 and 9:00 a.m., petitioner was taken by the Federal Bureau of Investigation agents before United States Commissioner Harve M. Duggins in Knoxville. He waived preliminary examination, bail was set at $10,000, and he was committed to the custody of the United States Marshal of the Eastern

District of Tennessee[1] who in turn committed him to the Knox County Jail (R. 100a–104a, 5b–10b), in accordance with a contract entered into between the United States of America and the Sheriff of Knox County (R. 131a) for the custody of federal prisoners.

The following day, February 26, 1959, a complaint (R. 17b) was filed by an agent of the Federal Bureau of Investigation before United States Commissioner Duggins charging petitioner (together with his wife and a third party) with violation of the Dyer Act, 18 U.S.C. 2312, by having transported a stolen automobile from Alabama to Tennessee, on or about February 24, 1959. A warrant for petitioner's arrest was issued and executed the same day by the United States Marshal (R. 15b–16b). On February 27, 1959, at a proceeding before the United States Commissioner for the Eastern District of Tennessee, petitioner was committed to the Knox County Jail on the Dyer Act charge (R. 11b–13b). On March 5, 1959, petitioner, represented by counsel, was afforded a hearing by the Commissioner on the Dyer Act charge, bound over to

---

[1] The committment paper was erroneously made out to read as follows:

"You are hereby commanded to take the custody of the above named defendant and to commit him with a certified copy of this commitment to the custodian of a place of confinement within the Eastern District of *Georgia* approved by the Attorney General of the United States where the defendant shall be received and safely kept until discharged in due course of law." (Emphasis added.) (R. 9b, 83a, 117a.)

The Marshal's return certifies commitment to the Knox County Jail, Tennessee (R. 10b). Petitioner's attempt to challenge the legality of his commitment because of this technical irregularity is discussed, *infra*, pp. 9–10.

the Grand Jury, and bail was set at $15,000. Petitioner was then returned to the Knox County Jail (R. 13b–14b, 106a–108a).

Due to the pending Dyer Act charges in the Eastern District of Tennessee, there were no removal or extradition proceedings to return petitioner to Georgia (R. 121a–122a). Petitioner remained in the Knox County Jail until May 6, 1959. The Grand Jury did not meet after petitioner's arrest until May 8, 1959 (R. 152a). On May 6, 1959, petitioner escaped from the Knox County Jail (R. 147a–150a).

Petitioner was indicted on November 23, 1959, in the Eastern District of Tennessee, Northern Division, in one count, charging a violation of 18 U.S.C. 751, *supra*, p. 2, in that he, in that jurisdiction, escaped from the custody of the Attorney General of the United States and his authorized representative, while in custody by virtue of an arrest on a charge of a violation of Title 18, Section 1073, U.S.C., a felony (R. 4a). There was a jury trial and petitioner was found guilty. He was sentenced to 5 years imprisonment (R. 190a, 13a).

ARGUMENT

Petitioner's contention is that he was not within the legal custody (as distinguished from physical custody) of the Attorney General of the United States at the time of his escape from the Knox County Jail, and therefore cannot be held guilty of escape from federal custody. There is no merit to his claims and no reason for review by this Court.

1. Petitioner does not assert that his arrest was improper, but does claim that his confinement after

arrest was illegal because no warrant charging unlawful flight was served on him (Pet. 11). However, Rule 4(c)(3) of the Federal Rules of Criminal Procedure clearly states (*supra*, p. 4):

> The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but *upon request* he shall show the warrant to the defendant as soon as possible. * * * [Emphasis added.]

Petitioner at no time asked to see the warrant (R. 97a). And there is no doubt as to the existence and validity of the warrant for his arrest (R. 2b); moreover, he was informed, at the time, of its existence and the reasons for his arrest.

2. Petitioner also challenges the validity of his commitment to the Knox County Jail, on the ground that the commitment papers ordered the United States Marshal to deliver the prisoner to the Eastern District of *Georgia* rather than to the Eastern District of *Tennessee* (Pet. 11, 12). Obviously, this was a clerical error[2] since (1) there is no federal judicial district designated as the "Eastern District of Georgia", (2) the Commissioner would have no authority under Rule 40(b)(3) of the Federal Rules of Criminal Procedure to order his removal to Georgia,[3]

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[2] Rule 36 of the Federal Rules of Criminal procedure provides that such an error in the record may be corrected at any time.

[3] Petitioner's argument that no proper removal proceedings were had (Pet. 11) need not be further considered, since obviously the Commissioner was not holding a removal proceeding.

and (3) the record of proceedings and the return of the United States Marshal (R. 6b, 10b) indicate commitment of petitioner to an institution providing facilities for federal prisoners in the Eastern District of Tennessee, namely, the Knox County Jail.

3. Petitioner attacks the legality of his commitment on the Dyer Act complaint on the basis that no written commitment was issued (Pet. 12). The Commissioner admitted that he had made only an oral commitment, since petitioner was already incarcerated in that institution (R. 123a, 125a), but the record of proceedings definitely states that he was committed to the Knox County Jail (R. 11b–14b).[4] Petitioner was duly served with a warrant for his arrest on the Dyer Act charge (R. 15b–16b), and this warrant was properly admitted as evidence in the District Court as bearing on the question of the federal custody of the petitioner (R. 105a–106a). Obviously, due to the pending Dyer Act charges, petitioner was detained in the Knox County Jail to await the next session of the Grand Jury, beginning on May 8, 1959. For this reason no removal warrant was issued to return the prisoner to Georgia for prosecution under the unlawful flight charge (Pet. 11).[4]

4. We have shown that petitioner's complaints of technical defects in his commitment lack merit. In any event, even if the commitment were defective, petitioner plainly could not escape with impunity. In *Godwin* v. *United States,* 185 F. 2d 411 (C.A. 8),

[4] Had removal become possible, the court could readily have obtained the outstanding Georgia warrant and issued a removal warrant in compliance with Rule 40b (3) and (4) (Pet. 12).

an escape-from-custody case closely in point, the accused contended that his removal by the United States Marshal from the Eastern District of Texas to the Western District of Arkansas, upon order of a United States Commissioner in Texas, for commitment to an institution in Arkansas, was illegal. Without deciding the technical correctness of this procedure, the court held (185 F. 2d at 413):

> The defendant could not test the propriety of his confinement in the Miller County jail by forceably escaping from it.

The present petitioner was unquestionably in federal custody by virtue of process issued under the laws of the United States, within the meaning of 18 U.S.C. 751, *supra*, p. 2. Even had there been any real issue as to this point, the "doctrine of self-help is not available to a prisoner in a penal or correctional institution. Remedies are available for procuring through legal process the release of those who are unlawfully held in custody." *Mullican* v. *United States*, 252 F. 2d 398, 403 (C.A. 5). See also *Aderhold* v. *Soileau*, 67 F. 2d 259 (C.A. 5); *Bayless* v. *United States*, 141 F. 2d 578 (C.A. 9).

In *United States* v. *Puncsak*, 146 F. Supp. 523 (D. Alaska), the only case cited by petitioner as supporting him (Pet. 12), the offense committed was a violation of the territorial laws of Alaska, and not a violation of a federal statute. The defendant was placed in the physical custody of the Attorney General by confinement in the Alaska jail system, use of which facilities was provided to the territory by a contractual arrangement between the United States

Bureau of Prisons and territorial officials. The court held that under these conditions the prisoner's escape from the federal jail was not escape from the legal, as distinguished from physical, custody of the Federal Government. This is clearly distinguishable from the instant case, in which petitioner was in federal custody as a result of violations of federal statutes.

CONCLUSION

The decisions of the courts below are clearly correct, and there is no need for further review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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